

EKUSHEY TELEVISION CASE

Ekushey Television Ltd & Others vs. Dr. Chowdhury Mahmud Hasan & Others

54 DLR (AD) 130

Short Facts

- A. In 1998, Ministry of Information invited tenders to install and operate a television channel under private ownership. Seventeen enterprises participated in the tender. A technical committee was formed to evaluate the proposals from participants. Accordingly, the technical committee evaluated the proposals and divided the proposals of tenders into three categories. The first category included three companies who were found to be satisfactory. Second category included three companies as a second preference. The technical committee found the tenders of the other ten companies unacceptable. In the third category Ekushey Television was placed at serial No. 5. After submission of the evaluation report, the technical committee came under heavy pressure from an interested group. As a result of which, the technical committee changed the evaluation report and Ekushey Television which was in the rejected list in the earlier and original evaluation report, was placed at the top of the list of the participants found satisfactory. The Ministry of Finance set out a number of conditions for granting license to Ekushey Television. One of the conditions was that if the private channel transmitted its program simultaneously with the B.T.V. the private channel would pay Tk. 1200/- per hour and when no program was transmitted by BTV the hourly charge would be Tk. 1.800/- per hour. Upon a representation from Mr. A.S. Mahmud, ministry of finance deleted this condition thus exempted ETV from paying hourly charges. Though Mr. A.S. Mahmud did not participate in the tender on behalf of ETV, yet the agreement was signed between the Government of Bangladesh and Mr. A.S. Mahmud, in violation of tender notice. After signing the agreement with the Government, Mr. A.S. Mahmud transferred the license to the Ekushey Television Ltd. for Tk. 200 crores.
- B. The weekly magazine Jai Jai Din published three reports on how the license to run ETV was obtained and the illegal mechanism to prepare the evaluation report was practiced. From these reports, the petitioners came to know about this matter and moved to the High Court Division with a writ petition under Article 102 of the

constitution as they feel that the matter raised in the writ petition involves breaches of constitutional obligations and statutory duties by public functionaries. The petitioners claim that as conscious citizen of this country, they are duty bound to invoke the extraordinary jurisdiction of this court to compel the public functionaries to perform their public duty.

- C. The petitioners alleged that Mr. A.S. Mahmud being a private individual and not a commercial enterprise and having not participated in the tender, cannot in law, be granted license to install and operate a private TV channel. Therefore, the license agreement signed with Mr. A.S. Mahmud was malafide.
- D. The High Court Division found the selection process lacked transparency and the license given to ETV is not sustainable in law.

Counsels

Rafique Ul Haque, Dr. Kamal Hossain, Syed Ishtiaq Ahmed – for appellants

Abdur Razzaq –for respondent-writ petitioners

Hasan Ariff – Attorney General

Submission of the Counsels

Rafique Ul Haque

1. The writ petition is not maintainable since the petitioners are not directly affected.
2. The High Court Division acted illegally in holding that public litigation may even be directed against less fortunate persons when the question of malafide exercise of power or the question of transparency is agitated and thereby extended the scope of public interest litigation.
3. The High court Division acted illegally in making the rule absolute on the ground of transparency and malafide though the rule was issued in different terms.
4. The High Court Division committed illegality in holding that the selection process lacked transparency and accountability and as such the whole selection process was malafide in spite of the fact that the Government took various measures to ensure transparency in the selection process
5. The High Court Division did not find ETV responsible for such lack of transparency and yet made the rule absolute thereby depriving ETV of a license granted by the Government.

6. The High Court Division erred in law in not holding that the writ petition is not maintainable on the ground of delay and gross laches.

Syed Ishtiaq Ahmed

1. The High Court Division committed serious error of law in finding the writ petitioner has locus standi to file the present writ petition as public interest litigation.
2. The High Court Division committed error of law in making the rule absolute on the ground of malafide whereas the rule has been issued asking writ-respondents to show cause why the licensing agreement should not be declared to have been entered into without lawful authority.
3. The High Court Division committed illegality in adjudicating a concluded contract which can be challenged only if there is a breach of terms and conditions.
4. The High Court Division Should not have taken on its shoulder the burden to find malafide. It lies on the party who alleges it.
5. The High Court Division committed a serious error in law in adjudicating upon disputed questions of fact in the writ jurisdiction.

Dr Kamal Hossain

1. The intervener petitioners were not given any opportunity to present their position though they are affected by the judgment holding that the license granted to ETV was done without lawful authority.
2. Rights of bonafide third parties accrued as the investment companies operating more than two years and the judgment in effect destroys those rights.

Attorney General

1. The High Court Division committed illegality in observing that the Bangladesh Television failed to produce the file inasmuch as the records before the Court do not warrant such observation and which has no nexus with the materials on record.

Abdur Razzaq

1. The High Court Division failed in its constitutional obligation to correctly interpret the provision of article 145 of the constitution and consequently come to the conclusion that the ministry of information has signed the licensing agreement with the respondent no. 7 in violation of article 145 of the constitution and the Rules of Business.

2. The High Court Division has failed to correctly evaluate the provisions of article 55(6) of the constitution vis-a-vis the Rules of Business and consequently failed to hold that the Prime Minister has no authority under Rule 33 of the Rules of Business to act contrary to, or vary the specific statutory provisions as contained in section 4 of the Telegraph Act 1985 and section 5 of Wireless Telegraph Act 1933.
3. The High Court Division should have held that ETV Ltd was required to hold a statutory license from the government of Bangladesh under section 4 of the Telegraph Act, 1885 and statutory license from the Director General, Bangladesh Post Office under section 5 of the Wireless Telegraphy Act, 1933.
4. The High Court Division ought to have found that the respondent no. 7 having not participated in the tender, the licensing agreement signed by the ministry of information with the respondent no. 7 and the subsequent approval to transfer the license to ETV was malafide and without jurisdiction and therefore void.
5. The High Court Division has erred in law in not coming to the conclusion that the ETV Ltd has been unlawfully using various establishments and other facilities in violation of the specific agreement, exempting ETV Ltd from the payment to BTV, the use of BTV premises by ETV without prior permission from Key Point Installation Defense Committee, was unlawful and detrimental to the security of the State.

Issues and findings of the court

Locus Standi of the writ petitioners and maintainability of the Writ Petition

1. In Dr. Mohiuddin Faroque's case (49 DLR (AD) 1) it is stated that “..... if there is a public cause involving public wrong or public injury, any member of public or an organization whether being a sufferer himself/herself or not may become a person aggrieved if it is for realization of any of the objective and purposes of the constitution.” (para 44)
2. Mr. Justice Latifur Rahman has expressed that a person in approaching the court for redress of a public wrong or public injury has sufficient interest in the proceedings if he acts bona fide. (para 47)
3. What is meant by sufficient interest is basically a question of fact and law which shall have to be decided by the court. Therefore, there will always be an element of discretion to be used by the court in giving standing to the petitioner. From the above, it appears that the courts of this jurisdiction has shifted its position to a great extent

from the traditional rule of standing which confines access to the judicial process only to those to whom legal injuries caused or legal wrong is done. The narrow confines within which the rule of standing was imprisoned for long years have been broken and new dimension is being given to the doctrine of locus standi. (para 48)

4. The petitioners being citizens of Bangladesh are entitled to maintain an action because they have sufficient interest. Barring them will create a situation in which constitutional rights of general people will be denied. (para 50)
5. The duty which is breached, causing injury, is owed by the State, as a public authority, not to any specific or determinate class or group of people or to a particular individual, but to the general public. Such cases of public injury cannot necessarily be shown to affect the rights of a determinate class or a group of people. No one can possibly be shown to be in a position to claim that a specific legal injury is caused to him alone. If breach of public duty of this kind and proportion, is allowed to go without any redress the failure to perform such public duty would go unchecked and would open the door for corruption. There would be no check on the house of power. It will also result in a denial of constitutional rights of the general public. (para 71)
6. This court under constitutional mandate is duty bound to preserve and protect the rule of law. The cutting edge of law is remedial and the art of justice has to respond here so that transparency wins over opaqueness. (para 72)
7. Such gross violation of fundamental rights should shock the judicial conscience and force it to leave aside the traditional procedure, which shackles the locus standi and gives standing to the petitioners. Unless this court responds to it, governmental agencies would be left free to subvert the rule of law to the detriment of the public interest. We must therefore, reject the preliminary objection raised, challenging the locus standi of the petitioners in the writ petition, since important issues relating to public wrong and rule of law are involved. It being a litigation affecting public wrong, the petitioners have interest and locus standi to file the petition. (para 73)
8. It must be remembered here, that it is not possible to lay down in clear and precise terms what is required to give a petitioner locus standi when public injury or public wrong is involved. Locus standi is not a case of jurisdiction of the court, but a case of discretion of the court, which discretion has to be exercised on consideration of facts and law points involved in each case, as already pointed out in the case of Kazi Mukhlesur Rahman. As a matter of prudence and not a rule of law, the court may confine its exercise of discretion, taking into consideration the facts, the nature of the

public wrong or public injury, the extent of its seriousness and the relief claimed. Therefore, the concern shown by the Bar, that giving locus standi to the petitioner will open the floodgates, and the court will soon be overburdened by cases, does not hold good. The discretion to open the gates will always be with the court, which discretion will only be exercised within the bounds mentioned above. (para 74)

Change of evaluation report and the allegation of malafide in the process of preparing the evaluation report for opening a private TV channel

1. The allegation is that the evaluation report of the technical committee was changed. The High Court Division found that there are two evaluation reports Annexure-A(1) and Annexure-B(1). These two evaluation reports of the technical committee, bear the same number, the same date and are also signed by all the four members of the technical committee. The evaluation report which is annexed as Annexure-A (1) was forwarded to the Secretary Ministry of Information by a letter which is annexed as Annexure-A. Similarly, the evaluation report annexed as Annexure-B (1) is forwarded to the Secretary Ministry of Information by a letter annexed as Annexure-B. In the third paragraph of Annexure-A (1) Ekushey Television is placed in the fifth position and found to be not responsive along with ten other participants. But in the Annexure-B (1) the position of the participants were changed to such an extent that non-responsive Ekushey Television was placed at the top of the responsive participants whereas Multimedia Production Company Ltd. which topped the list of the responsive participants in Annexure-A (1) was placed at the bottom of the list of Annexure-B (1).
2. Further to this an important change can be noted in the third paragraph of Annexure B1. A sentence is added by which the proposals of some of the participants mentioned therein, including Ekushey Television, are to be considered subject to some conditions. This sentence is quite poignantly absent in Annexure A1.
3. The report does not mention what were the conditions and who set or decided those conditions nor any explanation for changing the position of ETV from a nonresponsive participant to a responsive participant. "It is strange to note that it is not mentioned that on the basis of the evaluation of proposals of all the participants, the proposals of those eight participants were found responsive rather it is mentioned that if certain conditions are fulfilled, only then their proposals may be considered.

The conditions which were required to be fulfilled for consideration of the proposals of those eight participants still remain unknown.

4. It also leads us to conclude, in agreement with the High Court Division, that the evaluation report, Annexure 'B' is not a 'complete report'. It does not state what conditions had to be fulfilled by the Ekushey Television to become responsive and placed at the top of the list. The conditions were not even disclosed to the participants. No reason is given for changing the Evaluation Report or why there are more than one report with the same memo number and the same date. The selection process of ETV reveals arbitrary action and abuse of power and the evaluation report of the Technical committee malafide.
5. Law requires that subsequent change of terms and conditions of tender must be relayed to each and every participant so that all the participants can avail of the equal opportunity while participating in the tender. But in this case subsequent change of conditions were kept secret to other participant. As a result of which requirement of law are not met with and other participants were discriminated and deprived of participation in the tender on equal terms. (para 59)

Licensing agreement and the role of ETV and Mr. AS Mahmud

1. The role of Mr. A S. Mahmud, the respondent No. 7 and the Chairman of ETV is no less dubious than that of the Secretary, Ministry of Information. As the ETV affair unfolded his role became progressively dubious. He, in his capacity as the Chairman of Ekushey Television applied for withdrawal of per hour payment to BTV (Annexure 7(a) of the affidavit-in-opposition of respondent Nos. 6 & 8) and obtained the concession from the Ministry of Finance and then entered into an agreement in his individual capacity and not on behalf of ETV for establishing a private TV channel with the Government of Bangladesh, represented by the Joint Secretary, Ministry of information (Annexure 8 of the affidavit-in-opposition of the respondent Nos. 6 & 8).
2. From the record it may be seen that Mr. A.S. Mahmud did not participate in the tender in his own individual capacity. The tender notice dated 6.5.1998 also did not invite any individual to participate, it only invited financial and technical proposals from local and foreign firms individually or under joint venture and not from an individual. But what actually took place was contrary to the intention of the tender notice. After participating in the tender on behalf of ETV Mr. A.S. Mahmud signed the license agreement in his individual capacity with the Government of Bangladesh.

3. It is not understood why the agreement was not signed with ETV but was signed with Mr. A.S. Mahmud, in his individual capacity, when ETV was there, when its organum was there and when Mr. Simon Dring of B.B.C. was there.
4. Annexure-10(a) of the affidavit-in-opposition of the respondent Nos. 6 & 8 further reveals, that while giving permission to transfer the license to ETV, Mr. A.S. Mahmud was asked to send all the papers and information to the Ministry. It only leads to the conclusion that the license was given by the Ministry without consulting the relevant papers, which means the question of giving license to ETV was already decided.
5. The above leads us to conclude that the Ekushey Television is an example of wanton license with a shady deal in every step of the licensing process. It illustrates how executive power can be corrupted while law is forced to take back seat. It essentially appears that the concerned bureaucrats washed off their hands from public duty on pressure from above, without any regard to law. What strikes the thinking minds is that this gives administrative corruption an all permissive dimension. If abuse of power in the ETV affairs is not allowed to be challenged before this court, it will undermine the constitutional provisions that establish the relevance of executive adherence to rule of law. What happened in this case must open the eyes of both the Government as well as the people at large to the uncontrolled exercise of executive power. Providing immunity will be against the rule of law that requires accountability and transparency in running the Government.

Delay and gross laches in approaching the court for redress

1. The rule in respect of the courts power to inquire into delayed and old claim is not a rule of law, but a practice and depends much on proper exercise of discretion. Each case must depend on its fact such as how the breach of fundamental right occurred, the nature of the injury and lastly how the delay is caused. The test in such case is not physical running of time but whether a parallel right has accrued and whether the lapse of time can be attributable to laches and negligence.
2. While the circumstance justifying the conduct exists, the illegality which is manifest, cannot be sustained on the sole ground of laches. In this particular case ETV was granted license on 9.3.1999 and it started broadcast on 8.3.2000. Three reports on how ETV license was obtained appeared in the Weekly Magazine Jai Jai Din on 1.9.1998, 22.1.1998 and 11.9.2001. The last and third one was the cover story and it appeared after ETV started broadcasting. Therefore, the petitioners claim that there

was no delay in approaching the court. The High Court Division has accepted the explanation and we do not find any reason not to accept it.

Concluded contract and its enforcements in writ petition

1. The writ petition before the High Court Division was not regarding breach of terms and conditions of a contract. In this particular case the High Court Division looked into the procedure adopted in giving license to ETV and on doing so, it has exercised its jurisdiction under Article 102 which on the facts of the case, in our view, is quite justifiable. (Para 77)

High Court Division directing parties to lead evidence in writ petition

1. If the learned Judges of the High Court Division thought it appropriate that an investigation should be made in a writ petition, they were not barred from directing parties to lead evidence. Such an investigation only assists the court in the realization of the constitutional objectives. Such directions and orders passed by the court are incidental or ancillary to its jurisdiction of enforcement of fundamental rights. Power has been vested in the High Court Division to issue writ or order to any party within its jurisdiction, under Article 102 of the Constitution. But this power should be exercised cautiously and prudently. (para 78)

Court's consideration of third party rights in adjudicating a case

1. The third party rights exist and fall with the Ekushey Television, since their interests are merged with that of ETV. The substantive legal principle in this regard is that every person subject to the ordinary law within the jurisdiction. Therefore, all persons within the jurisdiction of Bangladesh are within Bangladesh rule of law. The foreign investors in ETV are no exception to this principle. The submission of Dr. Kamal Hossain is, therefore, bereft of any substance. (para 80)

Hence, Appellate Division dismissed the leave petition and upheld the decision of the High Court Division.

Conclusion

In this case, the scope of the doctrine of *locus standi* has been expanded. Although, it is the discretionary power of the Court to allow the Petitioner to put forward public cause, however, by this Judgment, the concept of public injury has been introduced for the purpose of *locus standi*. This Judgment also expanded the scope for interference on the ground of *mala fide* exercise of power. This Judgment is the continuation of earlier judgments propounded for expansion of *locus standi* for public good. Till date, our higher judiciary considers this case as authoritative decision.



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